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NO. 20474

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUNE E. BERRY, as the personal
representative of the Estate of
JOHN H. BERRY, deceased,

Appellant,

vs.

PACIFIC SPORTFISHING, INC., A. O.
LEAVITT and F. E. McEWEN, sole
owners of the boat "FISHERMAN",

Appellees.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

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MARGOLIS and McTERNAN
BEN MARGOLIS
3175 West Sixth Street
Los Angeles, California 90005

Attorneys for Appellant

WILLIAM B. MURRISH,
Of Counsel.

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Attorneys for Appellant

WILLIAM B. MURRISH,
Of Counsel.

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
JURISDICTION	1
STATEMENT OF THE CASE	2
SPECIFICATION OF ERRORS RELIED UPON	11
ARGUMENT	12
I ON THE PLEADED FACTS UNDER THE AMENDED CLAIM APPELLEES ARE BARRED BY ESTOPPEL AND WAIVER FROM INVOKING THE STATUTE OF LIMITATIONS.	12
II <u>UNDER BURNETT v. NEW YORK CENTRAL</u> <u>RY. CO. APPELLANT'S CALIFORNIA STATE</u> COURT ACTION TOLLED THE STATUTE OF LIMITATIONS AT BAR.	28
CONCLUSION	38
CERTIFICATE	39

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
American Home Assurance Co. v. Essy, 179 Cal. App. 2d 19	24
Baird v. Hodson, 161 Cal. App. 2d 687	24
Bank of United States v. Lee, 38 U.S. 100	26
Berry v. Pacific Sportfishing, Inc., et al., Los Angeles Superior Court Action No. SEC. 1889-S	3
Burnett v. New York Central Ry. Co., 380 U.S. 424	27-36, 38
Cantillon v. Superior Court, 150 Cal. App. 2d 184	25
Consolidated Fruit Jar Co. v. Wright, 94 U.S. 92	25
Cunningham v. Bethlehem Steel Co. (U.S.D.C. S.D.N.Y., 1964), 231 F.Supp. 934	37
Denver v. Forbes (U.S.D.C. E.D. Pa., 1960), 26 F.R.D. 614	16, 20, 21, 22, 27, 28
Devlin v. Flying Tiger Lines (U.S.D.C. S.D.N.Y., 1963), 220 F.Supp. 924	36, 37
Fitzsimmons v. Jones, 179 Cal. App. 2d 5	23
Glus v. Brooklyn Eastern Terminal (1959), 359 U.S. 231	12
Hayward v. National Bank, 96 U.S. 611	25
Herb v. Pitcairn, 325 U.S. 77	35, 38
Hord v. National Homeopathic Hospital (U.S.D.C. D.C., 1952), 102 F.Supp. 792	35

	<u>Page</u>
Meyer Koulish Co. v. Cannon, 213 Cal.App. 2d 419	24
Latimer v. Sears, Roebuck & Co. (C.A. 5, 1960), 285 F. 2d 152	35
Morgan v. Railroad Company, 96 U.S. 716	25
New York Central Ry. Co. v. Kinney, 260 U.S. 340	33
Order of Railway Telegraphers v. Railway Express Co., 321 U.S. 342	33
Taylor v. S. & M. Lamp Co., 190 Cal.App. 2d 700	24
Thompson v. Phenix Insurance Co. (1890), 136 U.S. 287	12
United States v. Shrewsbury, 90 U.S. 508	25
Van Beeck v. Sabine Towing Co., 300 U.S. 342	35
Weade v. Trailways of New England, Inc. (C.A.D.C., 1963), 325 F. 2d 1000	15-20, 22, 27, 28
Windiate v. Moore, 201 Cal.App. 2d 509	24
Zielinski v. Philadelphia Piers, Inc. (U.S.D.C. E.D. Pa., 1956), 139 F. Supp. 408	16, 18-22, 27, 28

Statutes

28 U.S.C. §1291	2
46 U.S.C. §185	2
Death on the High Seas Act:	
46 U.S.C. §§761-768	34
46 U.S.C. §761	2, 3
§3 (46 U.S.C. §763)	2, 3, 10, 34

<u>Rules</u>	<u>Page</u>
California Rules of Court:	
Rule 210(c)	5, 23
Federal Rules of Civil Procedure:	
Rule 8(b)	19
<u>Texts and Misc.</u>	
24 A. L. R. 2d 1413-1449	12
19 Am. Jur. 662	25
34 Am. Jur. 325-333	12
Annotation, "Estoppel to Plead the Statute of Limitations", 130 A. L. R. 8-67	12
Bigelow on Estoppel (6th Ed.), 648	26
California Judicial Council, "California Manual of Pretrial Procedure", 31 Calif. St. Bar Jour. Supp. 1	24, 25
31 C. J. S. 494	26
53 C. J. S. 962-965	12
Comment, "Developments in the Law of Statutes of Limitations", 63 Harv. L. Rev. 1177	12
Dawson, "Estoppel and Statutes of Limitations", 34 Mich. L. Rev. 1	12
3 Story's Equity Jurisprudence (14th Ed.), 582-583	26
Witkin, California Procedure, 1963 Supp. , 525-526	24
1 Wood on Limitations, 179-182	12

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APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal by appellant-claimant JUNE E. BERRY from a final judgment [R. 49] ^{1/} dismissing her Amended Claim for damages for a maritime wrongful death filed in an admiralty Limitation of Liability proceeding initiated below by the vessel owners, appellees-petitioners.

Jurisdiction in the District Court of the Limitation of Liability proceeding, and of the instant claim filed therein, is

^{1/} Signifying Transcript of Record, page 49.

founded on 46 U. S. C. §185. See also 46 U. S. C. §761. This Court's jurisdiction on appeal arises under 28 U. S. C. §1291.

STATEMENT OF THE CASE

The within cause is an appeal from a final judgment [R. 49] dismissing an Amended Claim for damages for a maritime wrongful death filed in an admiralty Limitation of Liability proceeding commenced by the vessel owners. The Court below permitted filing of the Amended Claim [R. 22-24] but dismissed it without trial and upon its face as barred by the statute of limitations [R. 22-24; 49]. (The applicable statute of limitations is Section 3 of the Death on the High Seas Act, 46 U. S. C. §763, providing a limitations period of two years.)

It is the position of appellant (claimant below) that upon the facts pleaded in the Amended Claim [R. 25-48] the bar of the statute of limitations was avoided by estoppel and waiver and by a state court filing sufficient to toll the limitations period.

There are no conflicts of fact in the instant appeal; the facts on appeal appear in the Amended Claim [R. 25-48], admitted as on demurrer on the motion to dismiss [R. 22-24].

The wrongful death, subject of this action, occurred July 13, 1962. On that date John H. Berry, husband of appellant and father of Ralph D. Berry, was lost overboard and drowned while a passenger on appellees' (the petitioners below) motor vessel The Fisherman in Pacific waters south of Santa Catalina Island and

more than a marine league from the shore of California [R. 25-26].

Claiming negligence by appellees in the operation and control of the vessel as the proximate cause of the decedent's death, appellant (wife) in timely manner and on July 11, 1963 filed a state action for wrongful death in the Superior Court of the State of California for the County of Los Angeles, being Action No. SEC 1889-S [R. 27, 34-36]. In said action appellant was represented by her then attorney L. W. Johnston who was "neither experienced in nor knowledgeable" in admiralty law [R. 27] and who was unaware in filing said state court action that because the death occurred more than a marine league from the shore (the state court complaint alleged the accident occurred "approximately ten (10) miles off the Eastern end of Santa Catalina Island"---R. 35) the exclusive jurisdiction for remedy thereof was in the United States District Court in an action in admiralty under the Death on the High Seas Act, 46 U. S. C. §§761 et seq. [R. 27].

As stated above, the statute of limitations under the Death on the High Seas Act is two years (46 U. S. C. §763). Thus appellant had---but did not then realize it---but one year remaining after filing her state court action in which to refile such action in (or otherwise effect transfer of jurisdiction to) the proper, exclusive jurisdiction, the United States District Court, before the limitations statute ordinarily would have run.

The state court complaint [set forth in full at R. 34-36] was filed July 11, 1963. It alleged negligence against appellees in the operation and control of the boat. On February 5, 1964, appellees,

through their counsel, Overton, Lyman and Prince and Dan Brennan, filed their answer. Appellees' counsel in filing said answer were "knowledgeable and experienced in admiralty and maritime law" and "well knew that the action was filed in the wrong forum" [R. 27-28]; acting "intentionally . . . in a manner calculated to lead [appellant] and her counsel to believe that there was no jurisdictional . . . question" [R. 30], appellees' counsel in said answer [set forth in full at R. 37-39] denied negligence and pleaded contributory negligence and assumption of risk, but pled no matter "formally or informally putting [appellant] on notice that she was proceeding in the wrong forum." [R. 28].

Further in said answer appellees alleged that they "proposed" to file in the United States District Court a petition to limit their liability; however "none of said [appellees] did initiate such a limitation of liability proceeding at that time or at any time until the day after" the two year period when the statute of limitations under the Death on the High Seas Act ordinarily would have run [R. 28].

In detail, the Amended Claim as to appellees' state court answer alleged as follows:

"(d) The law firm of OVERTON, LYMAN & PRINCE and DAN BRENNAN, attorney at law, proctors for petitioners herein, were at all times herein material knowledgeable and experienced in admiralty and maritime law and, on information and belief, well knew that the action was filed in the wrong forum. Nevertheless, said

law firm on February 5, 1964, six months after said complaint was filed and five months before the expiration of the two-year period within which the statute of limitations would have run under ordinary circumstances, lodged an answer thereto without formally or informally putting claimant on notice that she was proceeding in the wrong forum. A copy of said answer is attached hereto, labelled Exhibit B and by this reference made a part hereof.

"(e) In the said answer to the State Court complaint referred to above, petitioners, and each of them, alleged that they 'proposed' to file in this court a petition to limit their liability; however, none of said petitioners did initiate such a limitation of liability proceeding at that time or at any time until the day after the statute of limitations ordinarily would have expired on the claimant's right to commence a Death on the High Seas Action in this court under 46 U. S. C. §761."

---R. 27-28.

Thereafter and on May 8, 1964 and while there yet remained two full months before the limitations period ordinarily would have run, a pretrial conference was held in the state proceedings. Notwithstanding the duty upon appellees and appellees' counsel under California pretrial law generally, and under Rule 210(c) of the California Rules of Court specifically, to formulate and express in said pretrial proceedings the "legal contentions . . . as to the

issues remaining in dispute", appellees and their counsel in said proceedings "did not tender or raise the issue of lack of jurisdiction of the State court." [R. 28, par. (f)]. Specifically, in said pretrial proceedings appellees, through counsel, filed their "Separate Statement of Defendants Pacific Sportfishing, Inc. and F. E. McEwen of Legal and Factual Contentions and of Issues Remaining in Dispute" [Amended Claim, Exhibit C; R. 40-41] in which they raised and treated the issues only of negligence, proximate cause, damages, contributory negligence and assumption of risk, and intentionally concealed and withheld any claim or mention of want of jurisdiction.

In detail as to appellees' conduct in the said state court pretrial proceedings, the Amended Claim alleged as follows:

"(f) On May 8, 1964 a pretrial conference was held in the State Court proceedings, at which time the petitioners herein filed with that court their separate pretrial statement of contentions of fact and law. Said separate statement is attached hereto, labelled Exhibit C and by reference made a part hereof. In said pretrial statement petitioners did not tender or raise the issue of lack of jurisdiction of the State Court, notwithstanding the fact that Rule 210 (c) of the Superior Court Rules, California Rules of Court, requires that each party prepare and submit to the pretrial conference judge, at or before the conference, ' . . . a joint written statement of the matters agreed upon and a joint or separate written statement of

the factual and legal contentions to be made as to the issues remaining in dispute. ' * * *

"(g) In said separate statement the petitioners, and each of them, for the second time, announced their intention of filing a limitation of liability proceeding in this court. Notwithstanding said announcement of intention, none of the petitioners initiated such a limitation of liability proceeding until the first day after the above mentioned statute of limitations would ordinarily have expired. * * *

"(i) Said pretrial conference was held more than two months before the statute of limitations would ordinarily have run on the commencement of an action under the Death on the High Seas Act, 46 U. S. C. §761. No issue of the jurisdiction of the State Court was raised at the pretrial conference by the petitioners. Had the issue of lack of jurisdiction in the State Court to hear and decide the instant case been tendered at the pretrial conference, the claimant would have been actually put on inquiry as to whether the State Court and if not, whether the Federal Court, had jurisdiction in death cases such as the instant one occurring on the high seas beyond one marine league from territorial waters of the State of California, and there would yet have remained in excess of nine weeks before the statute of limitations ordinarily would have expired on a Death on the High Seas Action under 46 U. S. C. §761.

"(j) Because petitioners' attorneys were experienced

and the claimant's attorney was inexperienced in matters of admiralty and maritime law, and because the jurisdiction issue referred to above was never mentioned in the State Court proceedings, notwithstanding the petitioners' obligation to tender all issues of fact and law known to them at the time of the pretrial conference, the claimant was lulled by petitioners into a false sense of security with respect to the appropriateness of the forum she had chosen for the litigation of the instant claim. "

---R. 28-30.

The Amended Claim described the state court proceedings subsequent to the pretrial hearing, and the subsequent initiation in the court below of the Limitation of Liability proceedings, intentionally withheld until just one day after the running of the statute of limitations, as follows:

"(k) At said pretrial conference the State Court case was set five months ahead for trial on October 5, 1964. Nine weeks after said pretrial conference, or more specifically on July 13, 1964, the two-year period, i. e. the ordinary period for the statute of limitations, ran on the Death on the High Seas Action. On the very next day, that is July 14, 1964, petitioners initiated the instant limitation of liability proceeding by causing to be executed Petitioners' Stipulation for Costs, Affidavit of Value of the "Fisherman" and Interim Stipulation, which documents were filed two and

three days later, on July 16, 1964 and July 17, 1964, respectively. On the third day after said two-year period had expired, the instant petition was filed with this court, and on the following day this court issued its order restraining the initiation or prosecution of any litigation arising out of the death of JOHN H. BERRY except in the instant proceedings.

"(1) By reason of the conduct of petitioners as hereinabove set forth, petitioners and their counsel intentionally acted in a manner calculated to lead claimant and her counsel to believe that there was no jurisdictional or other question relating to claimant's cause of action. By this conduct claimant and her counsel were so misled at times when there still remained adequate opportunity to file her death claim in the proper court and under the appropriate statute. Petitioners then deliberately waited until the two-year period after the death of claimant's husband had expired before instituting the proceeding herein, wherein for the first time they raised the issue of jurisdiction in the State Court action, which issue they could, and in the exercise of ordinary fairness and their obligation under the rules of said court should, have raised in the State Court many months before.

"Petitioners were fully put on notice of the accident and of claimant's claim with respect thereto when the State Court action was instituted and were adequately put on notice to

defend themselves within the two-year statutory period so as not to render it unfair to petitioners to require that they defend this claim on the merits. In this case the interests of justice require that claimant's rights be vindicated in accordance with the humanitarian policy of the law, particularly in view of the fact that it can be done without unfairness to petitioners."

---R. 30-31.

As indicated in the above excerpt, appellees filed below their Petition for Exoneration from or Limitation of Liability on July 16, 1964 [R. 2]. Appellant thereupon filed below her original Claim seeking recovery for wrongful death [R. 31, par. (m)]. Appellees, in response, filed their answer to said claim pleading, inter alia, the claimed bar of the two year period of limitations under the Death on the High Seas Act (46 U. S. C. §763) [R. 31, par. (m)].

Thereupon, after leave [R. 22-23], appellant filed her Amended Claim [R. 22-48] setting forth the matters summarized and excerpted above, and pleading that by force thereof appellees "have waived and are and should be estopped from asserting the affirmative defense of the running of the statute of limitations . . . and the said statute has been tolled and extended by the filing of the State Court action [and the acts and conduct of appellees]." [R. 27, lines 7-11].

In response to appellant's Amended Claim appellees moved

to dismiss the same as "barred by the statute of limitations" [R. 23, lines 23-24], which motion was granted [R. 24]. Thereupon judgment of dismissal on the grounds of the bar of the statute of limitations was entered [R. 49]. From that judgment this appeal is prosecuted.

SPECIFICATION OF ERRORS RELIED UPON

Upon this appeal appellant contends:

(1) That the dismissal of appellant's Amended Claim below was erroneous because, upon the facts alleged in the said Amended Claim and admitted by the motion to dismiss, appellees have waived and are and should be estopped from asserting the affirmative defense of the statute of limitations under the Death on the High Seas Act;

(2) That the dismissal of appellant's Amended Claim was erroneous because, under the facts alleged in said Amended Claim and admitted by the motion to dismiss, the running of the statute of limitations under the Death on the High Seas Act was tolled and extended by the filing by appellant of the timely California state court action for wrongful death described in the Amended Claim.

ARGUMENT

I

ON THE PLEADED FACTS UNDER THE AMENDED CLAIM APPELLEES ARE BARRED BY ESTOPPEL AND WAIVER FROM INVOKING THE STATUTE OF LIMITATIONS.

The base premise of estoppel and waiver law with respect to statute of limitations problems is that if a defendant or his representative or counsel by acts or words misleads a plaintiff into doing or refraining from any matter by force of an induced reliance or belief that no bar by the statute of limitations will or can be raised, the actor is estopped from raising such defense. (Glus v. Brooklyn Eastern Terminal (1959), 359 U.S. 231, 232-234; Thompson v. Phenix Insurance Co. (1890), 136 U.S. 287, 299; Dawson, "Estoppel and Statutes of Limitations", 34 Mich. L. Rev. 1, 15-25; Comment, "Developments in the Law of Statutes of Limitations", 63 Harv. L. Rev. 1177, 1222-1224; 34 Am. Jur. 325-333; 1 Wood on Limitations, 179-182; Annotation, "Estoppel to Plead the Statute of Limitations", 130 A. L. R. 8-67, and supplement thereto in 24 A. L. R. 2d 1413-1449; 53 C. J. S. 962-965.)

Grounded on this deep-rooted foundation, it is now established law, as will hereafter be developed, that if a litigant-defendant purposefully miscasts an answer or other pleading so as to intentionally omit, obscure or mislead as to a defect in the plaintiff's cause curable before expiration of the statute of limitations but not thereafter, such defendant after the running of the

statute of limitations will be estopped from invoking that defense or from taking any other advantage from his misleading act.

Further, it is also established law, as will also be developed hereafter, that wherever a person is subject to a duty to speak, the law requires that he speak fully and fairly, and if he fails so to do his failure of duty cannot be suffered to build for him, or preserve to him, a right to a statute of limitations defense; he will be estopped to invoke the statute.

The instant case involves violations of both of these estoppel rules of law. Appellees, through counsel, deliberately miscast their state court answer so as to omit, obscure and mislead as to the defect of exclusive Federal jurisdiction. Additionally, in the state court pretrial proceedings they repeated the same omission and concealment---this time in the face of a clear duty of law to state fully and fairly the "issues remaining in dispute". Both of these acts they did while ample time remained wherein the defect of exclusive Federal jurisdiction might readily have been cured by a simple refiling in the Federal court, and the prevention of that cure was appellees' very purpose.

Consider, in specifics, the timing, circumstances and nature of what appellees did. Knowing (from experience and expertise in admiralty law, which appellant's then attorney did not have) that appellant's state court action was without jurisdiction [Amended Claim, pars. 12(c) and (d); R. 27-28], and knowing appellant and her then attorney were unaware thereof and believed the action was validly pending, and "intend[ing]" specifically to

Applying to the foregoing facts the principles of estoppel law previously mentioned, it is clear that appellees at bar are estopped from now benefiting from their own wrong by invoking the statute of limitations.

(1) Firstly, as heretofore stated, it is established law that if a litigant-defendant intentionally casts an answer or other pleading in a misleading way so as to conceal or obscure a defect in the plaintiff's cause curable before expiration of the statute of limitations but not thereafter, estoppel will bar such defendant from taking advantage of his own wrong by invoking the statute of limitations defense. Thus at bar, where appellees intentionally cast their state court answer to raise only negligence, contributory negligence and assumption of risk and to conceal and withhold any claim or mention of want of jurisdiction [Amended Claim, par. 12(d) and Exhibit B; R. 27-28, 37-39], "intend[ing]" specifically to mislead appellant and her attorney "to believe there was no jurisdictional" defect and to "lull [them] into a false sense of security" until cure should be impossible, appellees are estopped now to raise to their own benefit the statute of limitations.

A case strongly in point is Weade v. Trailways of New England, Inc. (C.A.D.C., 1963), 325 F.2d 1000. There the plaintiff sued the wrong one of two corporations as the owner and operator of the bus which claimedly had caused plaintiff's accident and injury. The corporation sued, allegedly in conspiracy with the second corporation truly at fault and with the very purpose of

permitting the statute of limitations to run so plaintiff could not amend, did not directly deny in its answer that it was the bus owner or operator or allege the identity of the true owner and operator, but filed only a misleading, blanket general denial obscuring and concealing plaintiff's error in suing the wrong corporation. Thereafter, waiting until after the statute of limitations had run so no cure could be had, the corporation sued moved for summary judgment which was granted by the trial court.

The Court of Appeals reversed the order of summary judgment and directed the trial court to make findings whether the misleading pleading had been filed pursuant to a concerted purpose "to deceive by withholding from the District Court and from the plaintiff-appellant until . . . after the statute of limitations had run" (p. 1000) the fact that the wrong defendant had been sued. Relying inter alia upon the Zielinski and Denver cases hereafter discussed, the Court ruled that if the answer had been filed with such concerted purpose to deceive and mislead, both the corporation sued and the corporation truly responsible would be "estopped" to plead the statute of limitations, and the corporation sued would be further estopped to deny ownership and operation. Said the Court at page 1000:

"The plaintiff-appellant urges that the defendant-appellee Trailways of New England, Inc., and the firm of counsel representing it, conspired with Safeway Trails, Inc., to deceive by withholding from the District Court and from the plaintiff-appellant until well after the statute of

limitations had run against Safeway Trails, Inc. , the fact that the defendant-appellee was not a proper party defendant; that the defendant-appellee is estopped by its actions to assert that it is not a proper party defendant; and that Safeway Trails, Inc. , is estopped to plead the statute of limitations and should be added as a party defendant. The District Court, however, made no findings and conclusions on these points, which appear on the record before us to raise substantial issues of fact and law. " (Emphasis added.)

Emphasizing that the misleading general denial did not give fair notice of the true defense of wrong party sued, and emphasizing further that this was underlined and aggravated by the omission (as at bar) "to move immediately for summary judgment", the Court at page 1001 further observed:

"In our view, the present record does not support the suggestion that the general denial in defendant-appellee's answer 'was the plainest kind of notice to Weade that he had sued the wrong corporation. ' The relevant paragraph of the complaint includes allegations of date, place, injury, identity of bus driver, identity of bus owner and operator, collision, negligence of driver, negligence of company, and driver's status as agent, servant, or employee. Defendant-appellee's denial of 'each and every allegation' of this paragraph, rather than a specific admission of certain allegations, positive denial of others, and denial

of others only on the basis of lack of knowledge or information sufficient to form a belief, was, especially in the light of the failure to move immediately for summary dismissal, hardly calculated to give 'plain notice.' And defendant-appellee's later answers to plaintiff-appellant's interrogatories tend to suggest that defendant-appellee knew plaintiff-appellant did not have such notice. The case is therefore remanded to the District Court with directions to vacate the judgment entered, to make findings of fact and conclusions of law as to the points mentioned, and to enter judgment as it may then be advised."

The Weade case is strongly persuasive authority at bar.

As in Weade, the pleadings at bar were misleading and obscuring and failed to give fair notice of the true defense relied on (want of jurisdiction), and as in Weade it is expressly alleged at bar that the misleading and omissive features of the affected pleading allegations were intentional and characterized by purpose to deceive. Moreover, as in Weade appellees at bar failed to move in the state court proceedings for summary dismissal, which failure the Weade decision particularly notes aggravates the deceiving effect of the misleading pleading.

A second decision illuminative at bar, cited approvingly in Weade (325 F.2d at 1001), is Zielinski v. Philadelphia Piers, Inc., (U.S.D.C. E.D. Pa., 1956), 139 F.Supp. 408. There again, as in Weade, the plaintiff sued the wrong one of two corporations as

the owner and operator of a fork-lift which claimedly had caused plaintiff's accident and injury. Plaintiff sued corporation A whereas the true owner and operator was corporation B (operating under a lease from A). A and B had the same insurance company but were otherwise separate companies.

As in Weade the corporation sued (A) did not as required by Federal Rule 8(b) deny plaintiff's allegations of ownership and operation specifically but filed only an uninformative, misleading general denial. Additionally, in answering interrogatories A obscured the circumstance that the insurance report as to the accident was filed not by its employees but by employees of B, a fact which could have alerted plaintiff to his mistake of parties sued. It was held in such circumstances corporation A would be estopped to deny it was the true owner and operator, the statute of limitations having run to bar any claim against corporation B (which was not a party to A's misleading acts). Said the Court there at pages 413-414:

"Under the circumstances of this case, principles of equity require that defendant be estopped from denying agency because, otherwise, its inaccurate statements . . . in the record . . . will have deprived plaintiff of his right of action. If Interrogatory 2 had been answered accurately by saying that employees of Carload Contractors, Inc. had turned the matter over to the insurance company [or had the answer to the complaint been specific in denials of ownership and operation] it seems clear that plaintiff would

have realized his mistake. . . . At least one appellate court has stated that the doctrine of equitable estoppel will be applied to prevent a party from taking advantage of the statute of limitations where the plaintiff has been misled by the conduct of such party. See Peters v. Public Service Corporation, 132 N.J.Eq. 500, 29 A.2d 189 [where the Court said] at page 196: 'Of course, defendants were under no duty to advise complainant's attorney of his error, other than by appropriate pleadings, but neither did defendants have a right, knowing of the mistake, to foster it by its acts of omission.' " (139 F.Supp. at pp. 413-414, emphasis added.)

The principle and holding of the Zielinski case apply directly at bar. Here, as there, by "act of omission"---the deliberate omission in the answer of any claim or mention of improper jurisdiction, curable before the statute of limitations should run but not thereafter---appellant has been "misled by the conduct" of the pleader; here, too, therefore, "estoppel" bars any profit through plea or operation of the statute of limitations.

Also in point (and also cited approvingly in Weade in 325 F.2d at 1001) is Denver v. Forbes (U.S.D.C. E.D. Pa., 1960), 26 F.R.D. 614. There the plaintiff was injured by an automobile driven by A. B and A were mother and daughter and had the same name except for their middle initials. In pre-litigation negotiations the insurance company negotiated in the name of B, the mother,

and prepared the proposed releases in her name, although aware that the plaintiff believed she was negotiating with respect to the driver, the daughter, A. Negotiations failed and plaintiff, misled as above described, mistakenly sued B, alleging she was the driver and had operated the car negligently, striking plaintiff and causing the injuries sued for. In response, B's attorney filed an answer containing only a "bald general denial" and an affirmative plea of contributory negligence but raising no issue of wrong party sued. Moreover, thereafter in breach of a pretrial duty of law to file a statement of contentions within thirty days, B's attorneys failed and omitted to file such required statement for three months and until one month after the statute of limitations had expired. Then, for the first time, they explicitly declared in their statement as filed that B was not the driver of the car nor was the car being driven under her agency. Although the statute of limitations had run, plaintiff thereupon moved immediately for leave to amend to change B's name to A's.

On the authority of the Zielinski decision above, the Court in Denver v. Forbes held both A and B were "estopped" to take any advantage from the above described conduct, and since the same insurance company insured and represented both A and B it was ordered that A be directly substituted in the action in place of B and without right to plead the statute of limitations. The Court at page 616 observed:

"The insurance company was aware of the actual facts well within the two-year period after the accident, and that no

harm will be done if the daughter is substituted for the mother as defendant in the action is plainly evident."

The applicability of the Weade, Zielinski and Denver decisions to the cause at bar is clear. At bar as in the cited decisions appellant (the plaintiff in the state court proceedings) was mistaken and misconceived as to a legal matter of defense curable before but not after a running of the statute of limitations. Further, at bar as in the cited decisions appellees (the defendants in the state court proceedings) were aware of appellant's mistaken conception. In such stated premises appellees at bar, as the defendants in the cited decisions, were required by the law of pleading to answer the complaint in a manner setting forth fully, lucidly and fairly their true defenses, without either confusions or omissions deliberately calculated to continue appellant's mistake and misconception until after the statute of limitations had run. As summed up succinctly in Zielinski, " 'Of course, defendants were under no duty to advise complainant's attorney of his error, other than by appropriate pleadings, but neither did defendants have a right, knowing of the mistake, to foster it by its acts of omission. ' " (139 F. Supp. at 414.)

(2) Moreover, at bar appellees, through counsel not merely filed a misleading answer in the state court proceedings but beyond that breached as well the duties of candor and fair statement owed under law in the state court pretrial proceedings. Counsel for

appellees in their "Separate Statement of Defendants Pacific Sport-fishing, Inc. and F. E. McEwen of Legal and Factual Contentions and of Issues Remaining in Dispute " [Amended claim, Exhibit C; R. 40-41] raised and treated the issues only of negligence, proximate cause, damages, contributory negligence and assumption of risk, and intentionally cast their said Separate Statement to conceal and withhold any claim or mention of want of jurisdiction. They did this "intentionally . . . [and] in a manner calculated to lead claimant [appellant] and her counsel to believe there was no jurisdictional . . . question relating to claimant's cause of action." [Amended Claim, par. 12(1); R. 30.]

Under California law, as generally, it is an affirmative duty of law of all counsel to formulate and express to the court and to opposing counsel and parties a full, fair and accurate statement of all contentions of fact and law to be put in issue at the trial. Rule 210(c), California Rules for Superior Courts, captioned, "Duties of Attorneys in Respect to Pretrial Conferences" (emphasis added), enjoins upon all counsel a duty "at or before the conference" to prepare and submit "a . . . written statement of the factual and legal contentions to be made as to the issues remaining in dispute."

By definition and on principle this statement must be fair, accurate and complete. This because the entire purpose of pretrial proceedings is to "place the case in focus so that the defined and precise issues" may be readied by court and all parties for expeditious trial (Fitzsimmons v. Jones, 179 Cal. App. 2d 5, 8); the central object is to elicit and express "the real and substantial

issues in the case." (Baird v. Hodson, 161 Cal. App. 2d 687, 689; Windiate v. Moore, 201 Cal. App. 2d 509, 517; Witkin, California Procedure, 1963 Supp., 525-526.) The "purpose . . . is to clarify and define the issues" (Meyer Koulish Co. v. Cannon, 213 Cal. App. 2d 419, 433; Taylor v. S. & M. Lamp Co., 190 Cal. App. 2d 700, 707), to the end of "the elimination of unjustifiable expense and delay." (American Home Assurance Co. v. Essy, 179 Cal. App. 2d 19, 21.)

"A lawsuit is not a game of wits nor should the one with the most wealth or guile have an undue advantage over another. . . . At the conference the attorneys, with the assistance of the judge, should make every effort to reduce the case to those basic matters actually remaining in dispute and to sharply define those issues in the conference order so that each party may limit his preparation and proof accordingly."

---California Judicial Council, "California Manual of Pretrial Procedure", 31 Calif. St. Bar Jour. Supp. 1, 5-7.

Matters of pure law, such as the sufficiency of pleadings and issues of jurisdiction and the like, are particularly to be raised and resolved in the pretrial proceedings, not left for later raising or resolution. Otherwise, "[c]onceivably weeks of trial preparation and large expenditures of money might be incurred . . . all to no avail." (Taylor v. S. & M. Lamp Co., supra, 190 Cal. App. 2d 700, 707.) Specifically included here are questions of "establishing

jurisdiction":

"The matter of amendment of the pleadings in the light of [developments at the pretrial] should be determined; and as an adjunct the matter of identifying the parties as being proper and establishing jurisdiction. . . . In many cases it is of great benefit to explore the possibility of getting a ruling on an issue that may be determined as a matter of law to save assembling and producing factual proof unnecessarily. . . . "

---California Judicial Council, "California Manual of Pretrial Procedure", supra, 31 Calif.St. Bar Jour.Supp. 1, 8-9.

Thus it is an affirmative duty of law on all counsel in California state courts to fairly and fully state the true issues of dispute in pretrial proceedings. The duty runs to the court as well as to opposing parties and counsel, and, indeed, is enforceable ultimately under the powers of contempt. (Cantillon v. Superior Court, 150 Cal.App.2d 184, 187.)

It is familiar law that silence or omission to speak where there is in law a duty to speak can readily raise an estoppel. The maxim is, "One who is silent when he ought to speak will not be heard to speak when he ought to be silent." (19 Am.Jur. 662; Hayward v. National Bank, 96 U.S. 611, 617; Morgan v. Railroad Company, 96 U.S. 716, 720; United States v. Shrewsbury, 90 U.S. 508, 518; Consolidated Fruit Jar Co. v. Wright, 94 U.S. 92, 96;

Bank of United States v. Lee, 38 U.S. 100, 111; 3 Story's Equity Jurisprudence (14th Ed.) 582-583; 31 C.J.S. 494; Bigelow on Estoppel (6th Ed.) 648.)

Moreover, at bar the conduct of appellees' counsel in the state court pretrial proceedings in raising and treating in their Separate Statement the issues only of negligence, proximate cause, damages, contributory negligence and assumption of risk, and failing and omitting therein to make any claim or statement of want of jurisdiction, was not merely an act of omission and silence but an affirmative act of misspeaking. To state, in short, that the issues are A, B and C when truly they are A, B, C and D, and D is a crucial and decisive included issue, is not merely to omit but to affirmatively misrepresent, and this was done at bar in an area where the law requires integrity and candor.

Further, the misstating of the issues to conceal and obscure the issue of want of jurisdiction in the state court pretrial proceedings was a calculated misstatement by appellees' counsel, designed deliberately to mislead the California court and appellant and her counsel for the very purpose of gaining time to permit the statute of limitations to run. The state court pretrial proceedings were held May 8, 1964, while there yet remained two full months before the limitations statute would run in which the want of state court jurisdiction could be cured by a simple refile in Federal court. It was appellees' very purpose at the pretrial proceedings to cause the California court and appellant and her counsel to continue the California action without awareness of the issue of

Federal court exclusive jurisdiction and to continue to prepare for a full California trial notwithstanding that exclusive Federal jurisdiction made such preparations and proceedings moot and idle.

To appellees and their counsel it was no matter that the California court should keep an idle and needless case on its rolls and calendar, and no matter that appellant and her counsel should be misled, as should the court, to prepare for trial as upon the merits. Appellees' purpose required that the misconception as to jurisdiction by the California court and appellant and her counsel should continue until it should be too late to cure by a new, Federal action---notwithstanding, and in disregard of, the duties and mandate of California pretrial law for full and fair disclosure.

Thus at bar not only was there deliberate omissive and misleading conduct by appellees with respect to their duties regarding fair pleading, but, as well, with respect to the duties imposed in pretrial proceedings under California law. Appellees cannot now take advantage from their own wrong; under the Weade, Zielinski and Denver cases they are estopped now from invoking the statute of limitations as a defense.

(3) Additionally, applicability of estoppel and waiver at bar under the principles of the Weade, Zielinski and Denver cases is underscored by the policy thesis in Burnett v. New York Central Ry. Co., 380 U.S. 424, argued in detail hereafter under Point II below. That thesis emphasizes that liberal relief is to be granted from the bar of a limitations statute where a defendant is put upon

full notice of a plaintiff's claim within the limitations period and hence "[can] not have relied upon the policy of repose embodied in the limitations statute." As is hereafter developed, the Burnett case emphasizes that the policy objective of statutes of limitations is to prevent surprise and sleeping on rights, and where a defendant is put upon full and complete notice of a plaintiff's claim of rights, and particularly where this is done by a timely-filed but unwittingly defective judicial proceeding with service and appearance, the policy of the law tends strongly to favor "vindication of the plaintiff's rights." (380 U.S. at p. 428.)

Development of the Burnett case policy thesis is deferred to the treatment below under Point II but note is made here of the applicability of that policy thesis in aid of relief based upon estoppel and waiver upon the facts at bar under the estoppel principles of the Weade, Zielinski and Denver cases.

II

UNDER BURNETT v. NEW YORK CENTRAL RY. CO. APPELLANT'S CALIFORNIA STATE COURT ACTION TOLLED THE STATUTE OF LIMITATIONS AT BAR.

Under the Supreme Court decision in Burnett v. New York Central Ry. Co. (1965), 380 U.S. 424, appellant's California state court action, putting appellees on full notice of appellant's claims, and initiated in premises wherein judgment could have been had without issuance of new process and wherein all policy supports

for the statute of limitations were avoided or satisfied, was sufficient to toll the running of the statute of limitations and to thereby make timely appellant's original and amended claims filed herein.

The facts in the Burnett case were these. Plaintiff, a resident of Kentucky and an employee of the defendant railway, was injured in Indiana in the course of his employment. For unstated reasons of convenience plaintiff attempted to sue defendant on his Federal Employers Liability Act cause of action in Ohio. The accident occurred March 17, 1960 and plaintiff instituted his Ohio action in timely manner on March 13, 1963, before expiration of the three-year FELA statute of limitations.

Under Ohio law no Ohio court had proper venue for plaintiff's action; Ohio venue would lie only in the county of plaintiff's residence or of the accident situs, and, as seen, plaintiff was a non-resident of Ohio and the accident situs was in Indiana. Thus no Ohio court had proper Ohio venue and there was, therefore, no court to which transfer might be made upon a plea of improper venue. Defendant moved to dismiss for improper venue and this motion was granted on June 4, 1963, approximately two weeks after the three-year statute of limitations had expired (March 17, 1963).

Thereupon, plaintiff promptly (within eight days) refiled his action in Federal court. In the Federal court plaintiff contended his Federal filing was timely despite the running of the statute of limitations because the filing of his state court action was in good faith, with service of process on defendant and full notice to

defendant of plaintiff's claim, and should suffice to toll the statute because satisfying all of the statute's policy considerations. The Supreme Court agreed and sustained plaintiff's Federal action.

The Supreme Court's reasoning was deep-going and extends in full principle and policy to the case at bar. The Court reasoned that statutes of limitations "are primarily designed to assure fairness to defendants" to "prevent surprises through revival of claims that have been allowed to slumber until evidence has been lost." (380 U.S. at p. 428.) The fundamental object, said the Court, is "to put the adversary on notice to defend within the period of limitations." (p. 428.) In the case before it, said the Court, this basic purpose had been satisfied. Observed the Court, "Service of process was made upon respondent [in the timely Ohio action] notifying him that petitioner was asserting his cause of action," and while the Ohio court did not have venue the action there showed a Federal action was not neglected out of disinterest but was not filed "solely because [the petitioner] felt that his state action was sufficient." (p. 429.) "Respondent," therefore, "could not have relied upon the policy of repose embodied in the limitations statute, for it was aware that petitioner was actively pursuing his . . . remedy." (pp. 429-430.) It is recognized at least in proper and humanitarian circumstances, said the Court, "that the filing of a lawsuit 'itself shows the proper diligence on the part of the plaintiff which . . . statutes of limitations were intended to insure.' " (p. 430.)

Noting that Federal statutes and the statutes of many states

allow transfer after the statute of limitations has run of actions barred by venue or like nonsubstantive defects where transfer can be had within the courts of the affected jurisdiction, and other kindred statutes provide for a period of forgiveness during which a refiling will be allowed within the courts of the affected jurisdiction, the Court observed that such relief could not be had in the case there at bar only because there was no Ohio court with proper venue to which transfer could be had. This mere added circumstance, the Court reasoned, should not be permitted to defeat plaintiff's litigation rights. The remedy, said the Court, was to toll the FELA statute of limitations for the period of the pendency of the state action and until dismissal thereof should become final by an appeal or the lapse of time for appeal, and to permit a Federal filing at any time within this extended period.

The Court reasoned that the FELA statute was, in whole, a "humane and remedial Act" (p. 427) and its "humanitarian purpose . . . makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served in doing so." (p. 434.)

The Burnett case is on all fours with the case at bar except for the single circumstance that in Burnett the defect requiring dismissal of the timely state court action was an incurable defect in venue, whereas at bar the defect in the state court action was a defect in jurisdiction. But upon two bases this difference fails to distinguish the Burnett case from the case at bar and leaves the Burnett decision controlling here.

Firstly, the core and thrust of the Burnett case is that a timely albeit defective state court action tolls the Federal statute of limitations because it satisfies all policy objectives of a limitations period. Plainly this thesis applies regardless of the nature of the defect requiring dismissal of the notice-giving state proceedings.

Secondly, at bar the defect in the state action is fully equatable to the defect concerned in Burnett for here, as there, it was possible for the defendant to elect so to act that the state action could have resulted in a judgment without need for issuance of new process. Just as the defendant in Burnett as the Supreme Court there noted at p. 429 could have elected to waive venue objection, so at bar appellees could have moved to remand the state proceedings to a Federal court which under applicable law would then have retained jurisdiction without issuance of new process despite the state court's defective jurisdiction so long as remand was had before the expiration of the statute of limitations period. Hence Burnett at bar is fully satisfied.

(1) Treating these points in sequence, it is first evident that the controlling policy thesis of Burnett was that the timely but defective state proceedings tolled the Federal statute of limitations because the giving to the defendant there of full notice of the plaintiff's legal claim satisfied in full the policy objectives of a limitations period. This policy thesis of the Burnett decision applies with full and equal force whatever the character of the

defect in the timely-filed state court proceedings. In point of fact Burnett involved a defect of venue rather than of subject matter jurisdiction, and the Court noted this circumstance, but the policy-thesis is and was unaffected by such feature. The controlling thesis of Burnett is the Court's declaration that the "primary design" of statutes of limitations is to "prevent surprises" and to "put the adversary on notice to defend within the period of limitations," and that this objective is fully satisfied by the filing of timely but defective state proceedings, with service of process, putting the defendant on full notice of the plaintiff's legal claim. (p. 428.) In such a case, says Burnett, the state court proceedings "put the adversary on notice to defend within the period of limitations" and the defendant cannot invoke the statute of limitations because he "[can] not have relied upon the policy of repose embodied in the limitations statute." (pp. 428, 430.) The case is one, declares Burnett, where the "policy of repose . . . is outweighed . . . [by] the interests of justice [which] require vindication of the plaintiff's rights." (p. 428.)

"[When] a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and . . . a liberal rule should be applied."

---New York Central Ry. Co. v. Kinney,

260 U.S. 340, 346;

cf. Order of Railway Telegraphers v. Railway

It is evident that the deep-going policy thesis of Burnett--- that where timely but defective state court proceedings, with service of process, place a defendant fully on notice of a plaintiff's legal claim, a statute of limitations as to a Federal court filing should be tolled---applies fully in fact and in principle at bar. Indeed, at bar appellees were not merely made aware of and served with process in the state court proceedings but actually themselves connived therein to prolong those very proceedings despite their defect until the limitations period should run, so that appellees might then turn the statute's purpose of protection into a weapon to defeat appellant's right to sue upon the merits. Because of this seriously aggravating feature the case at bar is particularly one where, in the language of Burnett, the "policy of repose . . . is outweighed" and where "the interests of justice require vindication of the plaintiff's rights." (p. 428.)

Furthermore, at bar as in Burnett the nature of the statutory right sued upon by appellant re-enforces a liberal, right-preserving approach to the statutory-construction question as to the permissibility of tolling the limitations period allowed. The right of action at bar arises under the Federal Death on the High Seas Act (46 U.S.C. §§ 761-768) and the limitations period is the two-year period allowed by Section 3 of that Act (46 U.S.C. §763). Being a "wrongful death" statute, the Federal Death on the High Seas Act is, like the FELA involved in Burnett, a "humane and remedial Act" and its "humanitarian purposes" require its

limitations period to be liberally interpreted where literal enforcement would forfeit rights "when no policy underlying a statute of limitations is served in doing so." (380 U.S. at pp. 427, 434.) (Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350-351; Latimer v. Sears, Roebuck & Co. (C.A. 5, 1960), 285 F.2d 152, 158; Hord v. National Homeopathic Hospital (U.S.D.C. D.C., 1952), 102 F.Supp. 792, 793-794.)

Thus the humanitarian and liberal-interpretation policy thesis of Burnett that prior timely but defective proceedings toll the statute of limitations if sufficient to put the defendant on full notice of the plaintiff's legal claim, applies at bar even if the specific holding of Burnett be assumed to be distinguishable or inapplicable.

(2) Moreover, the cause at bar in any event comes within the specific holding of Burnett. The holding in Burnett was that because the venue defect present in the state proceedings there could have been waived (380 U.S. at p. 429) by the defendant there (though it was not and the proceedings in actuality were dismissed), the case was one which could have led " 'to final judgment without issuance of new initial process, ' " and being so characterized was " 'enough to commence the action within the Federal statute. ' " (380 U.S. at p. 426, quoting from Herb v. Pitcairn, 325 U.S. 77, 79.) By this test the cause at bar qualifies equally with the cause at issue in Burnett.

It is true that at bar the defect in the state court action was

one of no "jurisdiction," not merely of no "venue." But in Burnett the venue objection was closely akin to a defect of jurisdiction because there there was no Ohio court to which transfer could be made because no Ohio court had proper venue. The action, therefore, was required to be, and was, dismissed. Nonetheless the Supreme Court held the action tolled the statute of limitations because the action could have proceeded to judgment without issuance of new process because the defendant could have waived the venue objection had it elected so to do. This is crucial for at bar the circumstances are fully parallel.

At bar the timely-commenced California court proceedings could have proceeded to a final judgment without commencement of a new action and issuance of new process since appellees could have elected within the limitations period to remove the case to Federal court. Appellant could not have compelled appellees to move to remand, but neither could the plaintiff in Burnett have compelled the defendant there to elect to waive its venue objections. Had the appellees effected a remand to the Federal court in the case at bar, the Federal court under applicable law would have retained the action despite the state court's original lack of jurisdiction, and the proceedings thus could have proceeded to ultimate judgment without issuance of new process, provided only that the remand was effected before a running of the statute of limitations.

Squarely in point is Devlin v. Flying Tiger Lines (U. S. D. C. S. D. N. Y. , 1963), 220 F. Supp. 924. There precisely as at bar a state court action was instituted upon a Federal Death on the High

Seas Act claim. The defendant removed the cause to the Federal court and then contended for dismissal because of the state court's original lack of jurisdiction as to a Death on the High Seas Act right of action. The Federal court held the state court had no jurisdiction but that since the statute of limitations had not run and dismissal would merely require the "meaningless acts" of a new filing and new issuance of process, the Federal court could and would retain the cause without dismissal, simply transferring it to the admiralty side for admiralty hearing. Said the Court there at page 928:

"Since the state court had no jurisdiction of the action, this court cannot acquire any by virtue of removal, even though the action could have been instituted here originally. Inasmuch as the action would be dismissed without prejudice to the filing of a libel in admiralty, and since the statute of limitations has not run to prevent the filing of such a new action, this court deems it pointless to go through meaningless acts. Accordingly, this case is transferred to the admiralty side of this court. "

In a subsequent decision of Cunningham v. Bethlehem Steel Co. (U.S.D.C. S.D.N.Y., 1964), 231 F.Supp. 934, 937, the procedure in and the reasoning and analysis of the Devlin case is expressly approved and followed.

Thus, in fine, appellees at bar just as the defendant in

Burnett could have elected to allow the proceedings commenced in the state court to proceed to an ultimate judgment without issuance of new process. Hence the cause here is within the specific holding of the Burnett decision, as well as within its humane, liberal policy-thesis. As the Supreme Court in Burnett observed, quoting from Herb v. Pitcairn, 325 U.S. 77, 79,

" '[When] process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to final judgment without the issuance of new initial process, it is enough to commence the action within the Federal statute.' " (380 U.S. at p. 426.)

CONCLUSION

WHEREFORE, for all of the reasons and considerations above stated it is respectfully submitted that the statute of limitations constituted no valid bar or defense below and the judgment dismissing appellant's Amended Claim on the ground of the statute of limitations should be reversed and the cause reinstated for trial.

Respectfully submitted,

MARGOLIS and McTERNAN

BEN MARGOLIS

Attorneys for Appellant

WILLIAM B. MURRISH,

Of Counsel.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ben Margolis

BEN MARGOLIS

